BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID F. STEED Claimant VS. **AIR SERVICE GROUP LLC** Respondent AND **UNITED STATES FIRE INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,022,067

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 24, 2008, Award entered by Administrative Law Judge Bruce E. Moore. The Appeals Board (Board) heard oral argument on November 5, 2008. Mark E. Kelly, of Liberty, Missouri, appeared for claimant. Kevin M. Johnson, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was permanently totally disabled and that future medical would be considered upon proper application.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent asserts that claimant has not proven he is entitled to permanent total disability. Respondent further argues that it is a violation of due process and equal protection to allow a claimant to be awarded a permanent total disability without requiring the claimant to demonstrate that he made a good faith job search in proving an inability to

work. Last, respondent argues that it should be entitled to a credit of 23 percent to the whole person because of claimant's preexisting impairment.

Claimant contends the ALJ correctly found that he is permanently and totally disabled. Claimant asserts that respondent was not denied due process or equal protection. Claimant also asserts that the award should not be reduced by 23 percent because claimant's preexisting impairment to his left hand was not aggravated in the work-related accident, and he is permanently disabled because of injuries to his left hip, left knee, and right knee.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?

2. Was respondent denied equal protection and due process because claimant was awarded permanent total disability but was not required to prove he was unable to find post-injury employment?

3. Is respondent entitled to have the award reduced by 23 percent because of claimant's preexisting impairment?

FINDINGS OF FACT

Claimant is 58 years old. He has earned his GED after having quit school in the 7th or 8th grade. He admitted that he served two years in prison for a burglary conviction when he was a teenager. He served in Vietnam in the Army. There he suffered an injury when a blasting cap blew up in his left hand, requiring the amputation of his index, middle and ring fingers.

Claimant began working for respondent in October 2004. Before he went to work for respondent, he had worked for a business called Air Up, until Air Up was purchased by respondent. Respondent is a business that operates coin-operated air machines and vacuum machines on a revenue-sharing basis. Claimant collected money from and serviced machines in Kansas and Missouri.

On January 6, 2005, claimant was traveling towards Inman, Kansas, when a trash truck slid through a stop sign during an ice storm and hit the vehicle claimant was driving. Claimant suffered severe injuries in the accident, including a fractured left hip socket, a fractured left knee, and a fractured right knee. Surgery was performed on his left hip and left knee. His right knee was placed in a cast. He was in the hospital, first in Hutchinson and then in Wichita, until January 14, 2005, at which time he was discharged to return home but continued to have physical therapy.

Claimant was referred to George Fluter, M.D., by his treating orthopedic surgeon for evaluation and treatment in regard to pain management and rehabilitation interventions. Claimant had previously been treated for a right patellar fracture, left acetabular dislocation with open reduction with insertion of plates and screws, and left tibial plateau fracture that required an open reduction with plates and screws. Dr. Fluter continues to treat claimant for chronic pain and has also diagnosed him with sciatic nerve irritation and depression, which he opined are attributable to the injuries he suffered on January 6, 2005. Dr. Fluter admits that there is no mention of treatment of claimant's right lower extremity in Dr. Fluter's medical records, nor do the records mention a problem with claimant's lumbar spine until March 4, 2008, when Dr. Fluter mentioned that he believed claimant was a candidate for a spinal cord stimulator. However, Dr. Fluter stated that claimant had complained of problems in his hip and buttocks area. Dr. Fluter believes that claimant is suffering some component of sciatic nerve involvement that has resulted in atrophy of his buttocks and thigh. Claimant's hip fracture has caused pain that has radiated into the buttocks and lower area of the back.

Although Dr. Fluter sent claimant to physical therapy, his main treatment has been medication management. Claimant is on a fairly extensive list of medication, including MS Contin and OxyIR, both narcotic analgesics, Naproxen, an anti-inflammatory medication, and Gabapentin, an anticonvulsant medication for chronic pain. He is also on an antidepressant and a sleep aid. Dr. Fluter recently prescribed a medication to help with nausea claimant was having related to his other medications. Dr. Fluter opined that tapering or discontinuing claimant's medications would cause worsening of pain symptoms and function and he believes claimant will need medication the rest of his life. These medications have side effects that include nausea, vomiting, constipation, drowsiness and sedation and will require periodic monitoring. The medications claimant is taking are for conditions that are a result of the work-related accident.

Dr. Fluter believes claimant has reached maximum medical improvement (MMI), as his condition is basically stable and not expected to change much in the course of the next year with or without treatment. In November 2006, using the AMA *Guides*,[1] Dr. Fluter rated claimant as having a 21 percent permanent partial impairment to the body as a whole. Since issuing that rating, claimant has had some buttocks involvement, and Dr. Fluter said there would be some impairment related to that which is not reflected in his original rating. Based on Dr. Fluter's findings, claimant's lumbosacral spine impairment would be in the Category II DRE model for a 5 percent whole body impairment. Dr. Fluter had not calculated that impairment in November 2006. Adding this 5 percent to claimant's original impairment rating of 21 percent would increase claimant's permanent partial impairment to 25 percent to the body as a whole. He did not give claimant a rating for his depression

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

because the fourth edition of the AMA *Guides* does not give a specific impairment percentage for depression.

Dr. Fluter said that claimant would be limited to sedentary level activities. The nature of his injuries and his chronic pain would make it difficult for him to work on a regular and consistent basis even at a sedentary level. It would be impossible for claimant to work an eight-hour day, five days a week because he had difficulty maintaining positions for prolonged periods. Dr. Fluter did not believe claimant could even work on a part-time basis. He said claimant would have to lie down and change positions during the day because of his chronic pain. He limited claimant's driving distance to 50 miles or less, about an hour's driving time, because of the amount of time sitting and being exposed to vibrations. He believes claimant's inability to work is due to the injuries from the accident.

Dr. Fluter reviewed the task list prepared by vocational rehabilitation consultant Karen Terrill. Of the 25 unduplicated items on that list, Dr. Fluter opined that claimant was unable to perform 22 for a task loss of 88 percent.

Claimant was sent to Theodore Moeller, Ph.D., a psychologist, by respondent on August 24, 2005. Dr. Moeller performed a number of psychological tests on claimant, but performed no tests for ability, memory or IQ. He opined that claimant was traumatized psychologically by his work-related injury and had a pain disorder associated with both psychological factors and a general medical condition, as well as an adjustment disorder with anxious mood. Claimant told Dr. Moeller he had an increasing anxiety about driving. Dr. Moeller said claimant was depressed. He described claimant as having modest intellectual skills. He recommended that claimant begin a goal-focused treatment approach focusing on his pain issues. He saw claimant twice in October 2005 and then on March 28, 2006. During those appointments, Dr. Moeller and claimant discussed vocational rehabilitation, but Dr. Moeller was unaware whether claimant followed through with that suggestion. The record indicates that claimant did not.

Paul Stein, M.D., a board certified neurosurgeon, examined claimant on January 16, 2007, at the request of respondent. He noted that claimant's hip socket had been broken and had to be put back into place. There was also removal of an intra-articular left hip bone fragment. Claimant had a laceration of his leg. He had an open reduction internal fixation of the left bi-condylar tibial plateau fracture. He had an open reduction internal fixation of comminuted, displaced, left posterior wall acetabular fracture.

Dr. Stein noted that claimant walked with a limp which was obviously related to his injuries. Claimant reported pain in his left leg and hip. He also reported some discomfort in his lower back. Claimant had right hip discomfort that claimant believed was caused because he kept a lot of his weight on the right side because of his injuries on the left.

Dr. Stein found tenderness in the lower lumbar area extending into the left buttocks and hip and restricted lumbar range of motion. Claimant had moderately severe

impairment of dorsiflexion and plantar flexion in his left foot and toes. He had atrophy of the quadriceps muscle. There was a reduction in claimant's calf circumference on the left versus the right. Claimant's left leg was 1 1/2 centimeters shorter than the right, and claimant walked with a limp. The left knee was tender to the touch, and there was some crepitus at the knee, which Dr. Stein related to the patellar fracture.

Dr. Stein diagnosed claimant with right patellar fracture, left hip dislocation with fracture, and left open tibial plateau fracture. He also noted that claimant had some psychological effects of the injury. He said there was a question of weakness in the distribution of the left sciatic nerve and recommended further testing to determine if claimant had a sciatic nerve injury. He sent claimant to Ty Schwertfeger, M.D., for nerve testing. However, after the first electrical shock, claimant complained of severe, incapacitating pain. Dr. Schwertfeger explained to claimant that in order to complete the test, he would have to administer more shocks at greater intensity, at which point claimant told him he would not be doing that. At that point, the testing was stopped, and Dr. Schwertfeger did not have any results to send back to Dr. Stein. Dr. Schwertfeger could not remember any patient who had experienced that much pain after the first initial shock.

Using the AMA *Guides*, Dr. Stein rated claimant as having a 16 percent permanent partial impairment to the whole body. This excluded any impairment claimant may have for a psychological impairment or for any possible nerve damage.

Dr. Stein placed restrictions on claimant of no squatting, kneeling, crawling, or climbing ladders. Claimant should do minimal stair climbing or walking on uneven surfaces. He should be able to alternate sitting, standing and walking as needed and should do minimal lifting or bending. Dr. Stein did not think claimant would be able to work more than a four-hour workday. Stair climbing and walking on uneven surfaces would put a significant amount of stress on the knee and hip. Also, claimant has trouble with walking distances and standing for long periods of time, so Dr. Stein wanted him to have the opportunity to sit occasionally or stop and rest if needed. Because most work activity requires some of the activities that claimant finds painful and that are restricted, working for more than four hours would cause more discomfort than is reasonable. Especially in light of his hip injury, claimant should not bend forward, as it would aggravate the pain he is having in his hip. The same is true with lifting.

Chris Fevurly, M.D., is board certified in internal medicine and preventative medicine. He saw claimant on April 4, 2008, at the request of respondent. Claimant's complaints to Dr. Fevurly were constant, nagging left groin, hip and upper buttocks pain. Dr. Fevurly rated claimant's pain as a 3 and, at worst, an 8-9 when pain medicine was not taken. His pain was aggravated by walking too fast, walking on uneven surfaces, or climbing stairs or hills. Claimant also complained of a constant burning pain in the medial left knee with an occasional giving way sensation. He has occasional swelling. Surgery in September 2007 did not change the severity of the left knee pain. Claimant complained

of mild low back pain, worse with prolonged standing and walking. There is associated numbness along the left lateral calf.

Dr. Fevurly found claimant had a slight limping gait but was not using assistive devices. Claimant told him that he occasionally used a cane. He had atrophy of the left thigh and calf as compared to the right. He had tenderness over the left lateral hip. He had pain with attempted motion of the left hip. He had mild reduction in range of motion of the left hip. Range of motion in the right hip was better than the left.

Claimant had generalized tenderness throughout the left knee. He had moderate crepitation in both knees but no loss of range of motion. He had no instability on either valgus or varus stress or anterior drawer sign and Lachman's test. He had tenderness over the medial joint line with a negative McMurray's test. He could not perform a squat but performed a toe and heel walk. Being able to do a toe walk demonstrates an intact S1 nerve root function. Heel walk demonstrates intact L4 and L5 nerve root function. Claimant had mild to moderate tenderness over the lower back. Range of motion of the low back was normal but he has pain with extreme ranges of motion to his low back. Straight leg raising did not produce a sciatic stretch abnormality but produced low back pain. He did not have straight leg raising abnormalities to confirm a nerve root entrapment from the lumbar spine. He had diminished sensation along the left lateral calf.

Dr. Fevurly diagnosed claimant with left hip dislocation with fracture of the acetabulum; left open tibial plateau fracture with intra-articular involvement; left patellar fracture, healed; right patellar fracture, healed; atrophy of the left thigh and left calf; and possible left-sided sciatica. Dr. Fevurly opined that claimant's diagnoses were causally related to his work injury of January 6, 2005. Utilized the AMA *Guides*, he rated claimant as having a 17 percent whole person impairment. Dr. Fevurly did not take into consideration any nonphysical factors in giving his impairment rating.

Dr. Fevurly placed the following restrictions on claimant: Alternate sitting and standing as needed, with walking and standing limited to no more than 30 minutes per hour or 15 minutes nonstop. Limit squatting to occasional. No kneeling or crawling. Limit climbing stairs and ladders to occasional. No high level activity, such as running or jumping. Limit lifting and carrying to less than 50 pounds rarely, 30 pounds occasionally.

Dr. Fevurly did not expect claimant would need a total knee or hip replacement in the foreseeable future. He did expect that claimant would need prescription medicine, currently used, into the foreseeable future.

Dr. Fevurly noted that claimant had suffered a traumatic injury to his left hand in the Vietnam War and has had resulting chronic pain in the left hand since, with resulting disability and impairment as a result of missing three fingers. Dr. Fevurly testified that the amputation of claimant's index, middle and ring fingers would compute to a 23 percent whole person impairment. Dr. Fevurly reviewed a job task analysis of

vocational rehabilitation counselor Mary Titterington. Of the 21 tasks on the list, he opined that claimant was unable to perform 14 for a 66.67 percent task loss.

Dr. Fevurly found it unusual that claimant had not returned to work and said that claimant was not totally disabled. Claimant, however, related to Dr. Fevurly that he did not believe he was capable of working and considered himself permanently totally disabled.

Karen Terrill, a vocational rehabilitation consultant, met with claimant on October 5, 2007, at the request of claimant's attorney. Ms. Terrill took an employment history from claimant. Together, they compiled a list of 25 tasks claimant performed in the 15-year period before his work-related accident. She reviewed a number of medical reports, which she relied upon in formulating her opinion as to claimant's physiological capabilities. She took a history of claimant's educational experience. Claimant has no more than a 9th grade education. He told her he flunked his classes in school except for his woodworking class. The educational history claimant gave her was consistent with the vocational testing Ms. Terrill performed. Other than his high school education, claimant had some vocational training when he went to truck driving school.

Ms. Terrill performed vocational testing on claimant. Claimant tested as someone who had severe academic deficits. He scored below average in all areas except mechanical reasoning and word knowledge. Ms. Terrill opined that claimant would not be a viable candidate for an educational opportunity because of his low scores on the Career Ability Placement Test.

Ms. Terrill believes that claimant is unable to engage in any type of work and is realistically and essentially unemployable based on the following factors: He has no readily transferrable job skills, his age, two doctors have placed him at a sedentary capacity of work, he has limited educational resources and deficits in his learning process, and he has limitations in regard to the amount of time he can work in a day. Further, Dr. Fluter has indicated that claimant could only work a maximum of 2 hours in an eight-hour day and has to lie down unpredictably during the day because of his chronic pain and the medications he is on. That restriction, that claimant would have to lie down unpredictably during the day due to chronic pain and medication, cannot be accommodated in Ms. Terrill's opinion. She opined that claimant had a 100 percent loss of wage earning ability.

The fact that claimant had an amputation before the January 6, 2005, accident did not play a role in Ms. Terrill's opinion that claimant is permanently totally disabled. Ms. Terrill testified that having only one functional hand could pose a problem in finding employment in some fields but would not be an impediment in other careers. With claimant's educational background, he was not able to perform work in the skilled level of work. However, claimant had the ability to function and had careers before the work-related accident, even with his disabled left hand.

Mary Titterington, a vocational rehabilitation counselor, met with claimant on February 26, 2008, at the request of respondent. Claimant reported to Ms. Titterington that he had finished the 8th grade with grades that varied from As to Fs, depending on the subject. He obtained a GED in 1974. He attempted a computer programming course in 1990 at a vocational technical school, which he did not complete. Claimant has two felony convictions, which would eliminate him from qualifying for a number of positions. He was honorably discharged from the military due to the amputation of three fingers on his hand. He related he had to leave a job with a company called the Nelson Company because he could not lift the pallets because of the amputation of his fingers. He also indicated some employers have told him they would not hire him because of the amputation.

Ms. Titterington obtained claimant's job history and performed vocational testing, including a standardized intelligence test. She also had him take two achievement tests and gave him a typing test. In regard to the intelligence test, she found that his verbal IQ was 103, in the average range, but his visual IQ was only 89, in the slow learner range. His general IQ was in the average range. A strong variance between the verbal and visual IQ can be indicative of a learning disability. She cannot diagnose a learning disability. The Wide Range Achievement Test showed a variance in scores. He had a word reading score at the 12th grade level and spelling and arithmetic at 6th grade level. The Adult Basic Learning Examination showed that claimant's language and grammar is at the 5th grade level.

Ms. Titterington said that claimant could not return to his old jobs because of his functional restrictions. His problems finding work because of his hands, felony convictions, anger control, and emotional ability, made his work force smaller than the average individual to begin with. Combining those with his restrictions, claimant's work base has eroded and he is unemployable in the open labor market. Also, he is not a good candidate for vocational rehabilitation. He has no transferrable skills. Ms. Titterington believes that claimant is permanently and totally disabled.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

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[2] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]
>
> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[5]

Claimant asserts that he is permanently and totally disabled as the direct result of the injuries suffered on January 6, 2005. Both Karen Terrill, claimant's vocational expert, and Mary Titterington, respondent's expert, agree. Claimant suffered severe physical injuries in the accident, resulting in limitations affecting his ability to walk, drive and work. He is, at best, limited to part-time work, and even then must periodically lie down. Even Dr. Fevurly agreed that claimant, with his injuries and resulting need for a multitude of medications, had no business driving. Dr. Fluter found claimant unable to work an eight-hour day due to his chronic pain. He expressed concern that claimant would not even be able to work part time. He also agreed that lying down is typical of people with chronic pain conditions.

Claimant's resulting condition is similar to that found in *Wardlow*.[6] In *Wardlow*, the claimant was severely injured in an automobile accident, suffering fractures to his low back, pelvis, right hip and right thigh with a possible fracture of his right ankle. As a result, he was severely limited in his physical abilities and was found to be unable to engage in substantial and gainful employment. Wardlow, like the claimant herein, was only able to work part-time sedentary work and lacked transferrable job skills. The court found the claimant, in *Wardlow*, to be "essentially and realistically unemployable".[7]

Here, the ALJ found, and the Board agrees, that claimant, with his significant injuries and resulting physical limitations, lack of transferable skills and need for ongoing medication, is "essentially and realistically unemployable". The Award of the ALJ, finding claimant to be permanently and totally disabled, is affirmed.

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes

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[4] K.S.A. 44-501(a).

[5] K.S.A. 44-510c(a)(2).

[6] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

[7] *Id*. at 113.

> increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[8]

Respondent contends that it is entitled to a credit for the amount of claimant's preexisting functional impairment. As noted by the ALJ, respondent's position is misplaced. Here, claimant suffered injuries to his back and lower extremities from the accident. His preexisting impairment to his left hand from the injuries suffered in the Vietnam War are to a separate and distinct body part. As noted in *Lyons*,[9] the reduction for the preexisting functional impairment, is appropriate only if the current injury is affected by the preexisting condition. That is not the case here, and respondent's request for a reduction in the award is denied.

Respondent argues that it was denied equal protection and due process because claimant was awarded permanent total disability but was not required to prove he was unable to find post-injury employment. Respondent argues that K.S.A. 44-510c is unconstitutional. As has been held many times, the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold that an Act of the Kansas Legislature is unconstitutional. Stated another way, the Board is not a court of proper jurisdiction to decide the constitutionality of laws in the State of Kansas.[10]

The Board notes the ALJ awarded ongoing medical treatment upon application. However, Dr. Fluter has indicated that claimant is in ongoing need of medical treatment, especially pain management. Dr. Fluter stated that he continues to treat claimant for the chronic pain. The Board finds ongoing treatment with Dr. Fluter to be appropriate and orders same to continue for pain management purposes until a modification is agreed to by the parties or until further order of the ALJ or the Director.

CONCLUSION

Claimant is found to be permanently and totally disabled. The Award of the ALJ is affirmed in that regard. Respondent's request for an offset pursuant to K.S.A. 44-501(c) is denied. Claimant is awarded ongoing medical treatment for pain management with Dr. Fluter until said treatment is ended by an agreement of the parties or until further order of the ALJ or the Director.

Respondent's request that K.S.A. 44-510c be declared unconstitutional is denied.

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[8] K.S.A. 44-501(c).

[9] *Lyons v. IBP*, 33 Kan. App. 2d 369, 102 P.3d 1169 (2004).

[10] *Jones v. Tyson Fresh Meats, Inc.*, No. 1,030,753, 2008 WL 651673 (Kan. WCAB Feb. 27, 2008).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated July 24, 2008, is modified to award claimant ongoing medical treatment in the form of pain management with George Fluter, M.D., but affirmed in all other regards.

Although the ALJ's Award approves claimant's contract of employment with his attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.[11]

IT IS SO ORDERED.

Dated this _____ day of November, 2008.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Mark E. Kelly, Attorney for Claimant
Kevin M. Johnson, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[11] K.S.A. 44-536(b).